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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. HUGO PINEDA, Defendant and Appellant.	B210554 (Los Angeles County Super. Ct. No. VA103453)

APPEAL from a judgment of the Superior Court of Los Angeles County, Margaret M. Bernal, Judge. Affirmed with directions.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Hugo Pineda, appeals from his convictions for one count of continuous sexual abuse (Pen. Code,[1] § 288.5) and lewd act upon a 14 or 15 year-old child. (§ 288, subd. (c)(1).) Defendant argues the trial court improperly sentenced him to state prison rather than granting probation and imposed the upper term as to count 1. At our request, the parties have discussed issues pertinent to the section 290.3 subsection (a) sex offender fine. Upon remittitur issuance, the trial court is to determine whether defendant has the ability to pay the section 290.3, subdivision (a) fine plus additional assessments, penalties, and a surcharge in light of all of his financial obligations.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) R.A. began living with defendant, her boyfriend, in an apartment in 1997. R.A.'s nine-year-old daughter, C.O., came from Guatemala to live with them. R.A.'s brother and a cousin also lived in the one-room apartment. Sometimes R.A., C.O., and defendant slept in the same bed. Defendant began touching C.O.'s legs, breasts, and vagina at night while they were sleeping in the same bed. Defendant touched C.O.'s breasts under her clothing and her vagina under her underwear. These events occurred three to four times a week when C.O. was 10 years old. R.A. was also in the bed at the time these incidents took place but was asleep. Defendant was often looking at the ceiling with his eyes open when he was touching C.O. C.O. often cried because she was mad or upset. C.O. was disappointed with R.A. This was because R.A. said that defendant was living with them to help them out. C.O. saw defendant as a father figure.

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[1] All future statutory references are to the Penal Code unless otherwise denoted.

After approximately two or three years, C.O. moved with R.A. and defendant to an apartment on Westmoreland Street. Defendant and R.A. had separate beds. C.O. slept on a lower bunk bed next to theirs. R.A. worked at night, returning home at approximately 1 a.m. While R.A. was at work, defendant would kneel next to C.O.'s bed three or four times a week. Defendant would grab C.O.'s breasts and reach under her underwear to touch her vagina. C.O. was approximately 11 and one-half years old at the time. C.O.'s younger sister, Y.A., had arrived to live with them. Y.A. had numerous surgeries. Following the surgeries, C.O. slept on the top bunk. It was not easy for defendant to reach C.O. when she slept on the top bunk.

When C.O. was approximately 13 and one-half years old, the family moved to a house on 77th Street. R.A.'s son, K.A., had arrived to live with them. C.O. and Y.A. slept in separate twin beds. The twin beds were in a separate bedroom in the 77th Street house. Defendant would come into the separate bedroom at night and awaken C.O. by touching her. Defendant grabbed C.O.'s breasts and rubbed her vagina with his bare hand on her bare skin for three or four minutes. Defendant would then close the door carefully and walk softly back to his room.

Defendant continued to touch C.O. three to four times a week for the first two years the family lived in the 77th Street house. When C.O. turned 15, she would close her door and lock it to prevent defendant from entering. However, R.A. sometimes became mad and required C.O. to leave the door unlocked. Defendant continued to come into C.O.'s room at night once or twice a week to touch her when the door was unlocked. Although defendant had sexually abused C.O. for approximately six years, she said nothing. This was because R.A. depended upon defendant for financial support. C.O. feared R.A. would be unable to support the family. As a result, it would be impossible to bring C.O.'s brothers from Guatemala. Defendant often spoke about how he supported R.A. and her children. Defendant told C.O. that if not for him they would not have what they did and she would not have her quincinera party for her fifteenth birthday.

C.O. was 15 years old when her brothers arrived. C.O. felt she needed to tell someone what had occurred and there was no point in keeping quiet. C.O. told Y.P. Y.P.

was C.O.'s godmother. Y.P. then spoke to R.A. concerning C.O.'s complaints about defendant. C.O. then told R.A. what occurred. R.A. became angry with C.O. And R.A. did not believe C.O. Approximately one week later, R.A. got into C.O.'s bed and fell asleep. Defendant came in and got into bed with R.A. Y.A., who was 12 years old at that time, was also in the room. C.O. got into the bed with R.A. and defendant. C.O. believed if defendant touched her she would be able to say something about it. When defendant thought C.O. was asleep, he tried to touch her breasts. C.O. began screaming. R.A. woke up and asked what was wrong. C.O. told her what occurred. Defendant denied any wrongdoing, saying C.O. was dreaming. C.O. slapped defendant. Thereafter, defendant admitted what he had done. Defendant said: "I am sorry. I didn't know what I was doing. Sorry. Sorry. If it helps you, I will throw myself through the window[.]" Defendant then began hitting himself on the side of the bed.

Thereafter, R.A. moved with her three children to an apartment on 53rd Street. Another woman moved in with them to share expenses. A few months later, R.A. said she couldn't afford the rent and bills by herself. Defendant moved back in with R.A. and her children. R.A. said that she had talked to defendant and there would be new rules. All of them slept in the same room. Defendant and R.A. slept in one bed. C.O. slept on the bottom bunk bed. Y.A. slept on the top bunk bed. On two occasions several months after he moved in, defendant attempted to touch C.O. while she was in her bed. Defendant slept with his head at the foot of the bed so that he was closer to C.O.'s bed. The beds were close enough that defendant could reach into C.O.'s bed. However, C.O. would move to the wall so as to avoid defendant's reach. After the second attempt, C.O. told R.A. what had occurred. R.A. assured C.O.: "Oh, it's only for a few months. He will go out of the house." However, defendant never left. C.O. testified defendant had been very controlling. According to C.O., defendant was jealous of her. Also, C.O. testified defendant was jealous of R.A. Defendant did not allow C.O. to date or talk on the telephone. In C.O.'s view, defendant was very possessive of her.

After one year, C.O. asked a counselor if it was possible to graduate from high school early. The counselor asked why C.O. wanted to graduate early. C.O. then

revealed what was going on at home. The counselor explained that she could not keep it to herself. The counselor notified the police. C.O. was 17 years old when she first spoke to the police. After speaking with the police officers, she was interviewed by Los Angeles County Sheriff's deputies. C.O. later spoke to Detective Scott Mc Cormick.

Detective McCormick arrested defendant in November 2007. Defendant was advised of his constitutional rights in Spanish and agreed to be interviewed. A recording of that interview was played for the jury at trial. Defendant admitted: touching C.O., but stated it occurred "not that many times"; if he touched C.O.'s breasts or vagina it was unintentional; and he may have touched C.O. six to eight times but could not remember the exact number of occasions.

III. DISCUSSION

A. Denial of Probation

1. Factual and procedural background

Defendant argues that the trial court abused its discretion in sentencing him to state prison rather than granting probation. Defendant reasons: "There were no allegations in this case of multiple victims, forcible sexual acts, or substantial sexual contact." At the sentencing hearing, the trial court noted it had read the probation report, the prosecutor's sentencing memorandum, and the report of Dr. Raymond E. Anderson. The prosecutor, Stephanie Chavez, argued that the high term should be imposed because defendant: repeatedly abused C.O. over a six-year period; testified he had never touched C.O. in the way she described; did not change his behavior even after he was "caught" by R.A. on one occasion; and had a place of advantage over C.O. and her family because he provided financial support. Defense counsel argued Dr. Anderson believed that defendant was unlikely to reoffend because the victim was not a stranger. Dr. Anderson also believed that defendant would benefit from group counseling. Defense counsel

argued that defendant had no prior criminal history. Despite defense counsel's representations, according to the probation report, defendant had previously been convicted of felony burglary. In addition, defendant had successfully completed a drug diversion program.

2. The trial court could reasonably deny defendant's probation request

In rejecting probation as a possible disposition, the trial court said: "I am at a loss as to why probation report recommends probation in this particular case because the defendant in this matter acting as a parental figure to the minor child repeatedly, and by that, I don't just mean on a few occasions, but with breaks of time in between, molested the child while she was laying between the parties, he and his girlfriend. [¶] The victim in this case had to be proactive in ending her abuse to even get her mother to [ac]knowledge it. And defendant has never acknowledged his responsibility for this crime. [¶] For all those reasons, court feels probation is not appropriate in this case. I would deny probation."

We examine the trial court's denial of probation utilizing the deferential abuse of discretion standard of review. (§ 1203.1; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121; *People v. Welch* (1993) 5 Cal.4th 228, 233; *People v. Warner* (1978) 20 Cal.3d 678, 682-683; *People v. Giminez* (1975) 14 Cal.3d 68, 72). The California Supreme Court has held: "This [sentencing] discretion, however, is neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice." (*People v. Warner, supra,* 20 Cal.3d at 683; see also *People v. Welch, supra,* 5 Cal.4th at p. 234; *People v. Giminez, supra,* 14 Cal.3d at p. 72; *In re Cortez* (1971) 6 Cal.3d 78, 85; § 1203.) The California Supreme Court also held: "'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate

sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977, quoting *People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 831.)

As set forth above, the trial court reviewed the sentencing memoranda, the arguments of counsel, the facts of this case and the probation officer's report. The trial court then enumerated its reasoned conclusion that it was not in the best interest of either defendant or society to grant him probation. Section 1203, subdivision (e)(5), states in relevant part: "Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: [¶] . . . [¶] (5) Unless the person has never been previously convicted once in this state of a felony . . . any person who has been convicted of . . . a violation of Section . . . 288 . . . or 288.5 . . . ." Defendant had been convicted of a burglary in 1992, and completed a diversion program following his arrest for controlled substance possession in 1996. In addition, defendant was charged in count 1 with substantial "sexual conduct" as defined by section 1203.066, which states in relevant part: "(a) Notwithstanding Section 1203 or any other law, probation shall *not* be granted to . . . any of the following persons: [¶] . . . [¶] (8) A person who, in violating Section 288 or 288.5, has substantial sexual conduct with a victim who is under 14 years of age. [¶] . . . [¶] (b) 'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object . . . or masturbation of either the victim or the offender." (Italics added.) Defendant was found guilty of continuous sexual abuse pursuant section 288.5, subdivision (a), with a child under the age of 14. The evidence demonstrated that defendant repeatedly rubbed the victim's vagina several times a week for six years. Defendant was therefore statutorily ineligible for probation absent unusual circumstances. The trial court could reasonably rule the circumstances of these offenses demonstrated defendant still posed a significant threat to society. These factors militate against the "unusual" case criteria of section 1203, subdivision (e)(5). (See *People v. Edwards* (1976) 18 Cal.3d 796, 807; *People v. Superior Court* (*Dorsey*) (1996) 50 Cal.App.4th 1216, 1229 ["[I]f the statutory

limitations on probation are to have any substantial scope and effect, 'unusual cases' and 'interests of justice' must be narrowly construed and . . . limited to those matters in which the crime is either atypical or the offender's moral blameworthiness is reduced"]; *People v. Axtell* (1981) 118 Cal.App.3d 246, 257-259.) No abuse of discretion occurred.

B. Imposition of the upper term

1. The trial court's reliance upon factors not decided by the jury

Defendant argues that the trial court improperly imposed the upper term as to count 1 because it relied upon factors that were not decided by the jury. At the sentencing hearing the trial court noted, "The court is no longer constrained to a presumptive midterm and the new law that was passed last year frees up the court to choose among the three terms available to it as long as the term that is chosen is supported by reasons stated by the court on the record." As set forth above, the trial court indicated that the defendant, a parental figure to C.O., repeatedly molested her over several years. The trial court further noted C.O. had to be proactive in ending the abuse and defendant never acknowledged his responsibility. The trial court ruled: "Defendant would be committed to state prison. Court is going to select the high term of 16 years based upon all the factors the court just reiterated as well as the factor that defendant's prior convictions were continuing seriousness."

In *Cunningham v. California* (2007) 549 U.S. 270, ___ [127 S.Ct. 856, 863-868], the United States Supreme Court invalidated California's determinate sentencing law to the extent that it authorizes the judge, rather than the jury, to find the facts permitting imposition of the upper term. (See also *People v. Sandoval* (2007) 41 Cal.4th 825, 831-832.) Thereafter, the California Legislature passed urgency legislation amending section 1170, effective March 30, 2007. (Stat. 2003, ch. 3, § 2.) That legislation brought the determinate sentencing law into compliance with the requirements set forth in *Cunningham*, and its progeny. As amended, section 1170, subdivision (b) states: "When

a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1202.3 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim . . . and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected . . . ." Our Supreme Court explained the 2007 legislation changed the determinate sentencing law in three ways: the middle term is no longer the presumptive term absent aggravating or mitigating circumstances; the trial court has broad discretion to impose the lower, middle or upper term based upon what best serves the interests of justice; and the trial court must set forth reasons for imposing the chosen sentence but need not make findings of fact to justify the term. (*People v. Sandoval*, *supra*, 41 Cal.4th at p. 844-845, 855; *People v. Wilson* (2008) 164 Cal.App.4th 988, 992.) Thus, section 1170 is no longer violative of the Fourteenth Amendment. (*People v. Sandoval*, *supra*, 41 Cal.4th at p. 852.)

Defendant was sentenced in this case on August 19, 2008, after the amendment to section 1170, subdivision (b), and our Supreme Court's discussion in *Sandoval*. As a result, the trial court had broad discretion to impose whatever term it felt served the interests of justice as long as it set forth reasons for the chosen term. Here, the trial court stated its reasons for choosing the upper term including the fact that defendant's previous convictions involved "continuing seriousness" and the fact molestation of C.O. took place repeatedly with few interruptions. In addition, defendant never accepted responsibility for his crimes. No Fourteenth Amendment violation occurred.

2. No ex post facto or due process violation resulted

Defendant argues that the retroactive application of the amendments to section 1170, subdivision (b) violated the constitutional proscriptions against ex post facto laws. (U.S. Const., art. 1, § 10, cl. 1; Cal.Const., art. 1, § 9.) This contention has no merit. *(People v. Sandoval*, *supra,* 41 Cal.4th at pp. 855-857.)

C. Additional surcharge and penalties

The Attorney General argues the trial court should have imposed additional penalties and fees and a surcharge on the section 290.3, subdivision (a) sex offender fine. Defendant argues only a $200 fine may be imposed. Count 1 charged that defendant committed the crime of continuous sexual abuse in violation of section 288.5, subdivision (a) between January 1, 2001, and February 25, 2004. Count 2 charged defendant with committing lewd conduct in violation of section 288, subdivision (a) between February 26, 2004, and February 25, 2005. Between January 1, 2001, and February 26, 2005, section 290.3, subdivision (a) stated, "Every person who is convicted of any offense specified in subdivision (a) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for violation of the underlying offense, be punished by a fine of two hundred dollars ($200) upon the first conviction or a fine of three hundred dollars ($300) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine." (Stats. 1995, ch. 91, § 121; *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248.) Because defendant was charged with and convicted of violating both section 288.5, subdivision (a), and section 288, subdivision (c)(1), the trial court, in compliance with section 290.3, subdivision (a) in effect at the time the offenses were committed, properly imposed a $300 fine upon the *second* offense. (See *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866; *People v.*

O'Neal (2004) 122 Cal.App.4th 817, 822 ["The statute [§290.3] does not limit the number of fines that may be imposed for multiple convictions in the same case"].) We presume that the trial court failed to impose a $200 section 290.3 fine as to count 1 because it made an ability to pay determination. (*People v. Valenzuela, supra*, 172 Cal.App.4th at p. 1249; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1369.)

Further, there should have been imposed on the maximum section 290.3 subdivision (a) $300 fine the following: the $300 section 1464, subdivision (a)(2) and $210 pursuant to Government Code section 76000, subdivision (a)(1) penalty assessments; the $60 section 1465.7, subdivision (a) state surcharge; the $90 Government Code section 70372, subdivisions (a)(1) state court construction penalty; and the $30 Government Code section 76104.6, subdivision (a)(1) deoxyribonucleic acid penalty. (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528-1530; *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1254.) Since the Penal Code section 290.3, subdivision (a) sex offender fine has an ability to pay provision, the count 2 fine must be reversed with directions to decide whether defendant has the capacity to make the required payments on a maximum $300 fine. (*People v. Walz*, supra, 160 Cal.App.4th at p. 1365; see *People v. Castellanos, supra*, 175 Cal.App.4th at pp. 1531-1532.)

No Government Code sections 76000.5, subdivision (a) penalty assessment or 76104.7, subdivision (a)(1) deoxyribonucleic acid penalty may be imposed as those provisions were enacted after February 25, 2004, and to do so would violate ex post facto principles. (*People v. Flores* (2009) 176 Cal.App.4th 1171, 1181-1182; see *People v. Avila*, (2009) 46 Cal.4th 680, 728.) Upon remittitur issuance, the trial court is to make an ability to pay determination. The trial court is to actively and personally insure the clerk accurately prepares a correct amended abstract of judgment which reflects any modifications to the judgment. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

IV. DISPOSITION

Upon remittitur issuance, the trial court is to determine whether defendant has the ability to pay the maximum $300 section 290.3, subdivision (a) fine as to count 2 as discussed in the body of this opinion. After reconsideration of the ability to pay issue, the superior court clerk shall amend the abstract of judgment to conform to the trial court's order and shall forward the amended abstract to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

MOSK, J.

KRIEGLER, J.